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**DISCONNECTION CLAUSES: AN INEVITABLE SYMPTOM OF  
REGIONALISM?**

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## **Disconnection Clauses: An Inevitable Symptom of Regionalism?**

**Kamala Dawar**

### **Introduction:**

‘Disconnection clauses’ are legal provisions inserted into multilateral conventions to ensure that certain parties to the convention are not required to apply the rules of the convention because other relevant rules have already been agreed to among themselves. A disconnection clause can also be described more generally as a ‘conflict clause’ because it signals to all parties that parallel and potentially conflicting treaty obligations exist.

Disconnection clauses have most commonly been inserted into treaties at the request of the Members of the European Community (EC) to indicate to the other parties to the convention that the EU Member States had concluded, or were about to conclude, similar or stronger measures between themselves in the same area. The European Court of Justice (ECJ) has stated that these clauses are intended not only to ensure compliance and to avoid conflict between systems, but also to signal that the joint participation of the Community and its Member States does not alter the scope of Community law in relations between the Member States themselves.<sup>1</sup> This ensures the primacy of Community law. For the EC, disconnection clauses therefore have a dual – internal and external – purpose.

The EC has defended the use of disconnection clauses on the grounds that if EC Member States become a party to a convention without such a clause they would be bound to apply the convention law instead of Community law due to the international law requirements of Article 27 of the Vienna Convention on the Law of Treaties (VCLT), which prohibit domestic legislation having primacy over international treaty requirements.<sup>2</sup> To follow the requirements of Article 27 VCLT would undermine the uniform application and integrity of Community Law in the area covered by the overlapping convention in question. When both the Community and the Member States are party to a convention<sup>3</sup> and no disconnection clause is inserted despite the existence of some related Community Law, the Community is instead required to make a ‘declaration of competences’ upon ratification. This declaration has a similar function to the disconnection clause, providing an overview of the division of competences between the Community and its Member States with respect to the obligations under the Convention.

Consequently, some commentators have defended disconnection clauses and blamed the VCLT on the grounds that it is unable to deal with the new complexity of regional entities such as the EC. And that it is of little surprise that disconnection clauses have emerged to fill the shortfalls of the VCLT.<sup>4</sup> Nevertheless, disconnection clauses are not without their own shortfalls. For while these clauses indicate to other contracting parties that the agreement is one in which there is, for example, Community competence and the Community rules to apply, they do not give any indication of the scope or nature of Community or Member States’ competence. Indeed, the use of disconnection clauses could be described as an illegal reservation, whereby the State or organization inserting the disconnection clause is simply excluding or modifying the legal effect of certain provisions of the

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<sup>1</sup> ECJ Opinion 1/03. The Lugano Convention: 7 February 2006

<sup>2</sup> The VCLT Article 27 on the Internal law and observance of treaties reads: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

<sup>3</sup> UNCLOS is an example of ‘mixed membership’ of both the EC and its Member States to a multilateral agreement.

<sup>4</sup> O. Tell. The Disconnexion Clause: The relationship between the future Hague Judgments Convention and the European instruments. 2001.

convention in its application to that party.<sup>5</sup> The 57th Session of the ILC Study Group reported that disconnection clauses had the potential to erode the coherence of the treaty and that certain members thought the practice to be illegal inasmuch as they were contradictory to the fundamental principles of treaty law.<sup>6</sup>

This paper presents a discussion of the disconnection clause which argues that while these clauses make it possible for a limited group of parties to enhance the objectives of a treaty by taking measures that correspond to their special circumstance, this practice also creates a possibility that the *inter se* agreement will undermine the original treaty regime. The actual impact of a particular disconnection clause depends on how the clause is crafted, along with the changing nature of the regime that it refers to. The potential for a disconnection clause to undermine the object and purpose of the original treaty can therefore be removed during its design. Nevertheless, without full disclosure when negotiating the convention, any clause that seeks to replace treaty provisions with an alternative regime that would be applicable only between certain parties may, at worst, be creating different standards for different parties and, at best, be opaque and incoherent.

This paper first describes the various types of disconnection clause, focusing on their purpose and development. It then assesses the main legal and political controversies surrounding these clauses before assessing whether these clauses could potentially create more legal problems than they are intended to solve or whether they are simply a practical response to deepening regionalism.

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<sup>5</sup> See for example: ILC Draft guidelines on reservations, Report of the International Law Commission on the work of its fifty-fifth session, 5 May - 6 June and 7 July - 8 August 2003 (A/58/10).

<sup>6</sup> See Report of the International Law Commission, 57th session, 2005, supplement No. 10 (A/60/10), Ch XI

## A Typology of Disconnection Clauses

While there is consensus that the purpose of a disconnection clause is to allow regional governmental entities that are integrated by binding *inter se* international rules to exclude the application of the multilateral convention in their mutual relationships, a precise definition has not yet been codified. There are about 20 conventions<sup>7</sup> containing a disconnection clause and the various types can be organised under three main categories:

a) Most well known are those contained in Council of Europe conventions that set out minimum standards. The disconnection clause here is designed to allow a higher standard to be applied between a smaller group of the parties. For example, the European Community became a party to the 1960 Convention ETS 33 on the temporary importation, free duty of medical equipment in 1983, and inserted a disconnection clause in Article 4:

‘The provisions of this agreement shall not prejudice more favourable provisions for the temporary importation of the equipment ..... contained in the laws or regulations of any Contracting Party or in any convention, treaty or agreement in force between two or more contracting parties.’<sup>8</sup>

b) Alternatively, some conventions establish minimum rules of procedural co-operation between the parties and include a disconnection clause to ensure that the convention does not prejudice co-operation on the same subject matter based on other international agreements. For instance, Article 22 (2) of Convention ETS 112 (1983) on the transfer of sentenced persons states that:

‘If two or more parties have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.’<sup>9</sup>

c) The other type of general disconnection clause is designed to allow some countries to rely on previously established uniform legislation or on special treaty arrangements to achieve the object of a Convention. For example, the Convention ETS 30 (1959) on mutual assistance in criminal matters sets out a disconnection clause in Article 26 (4) that reads:

‘Where, as between two or more contracting parties, mutual assistance in criminal matters is practiced on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting parties which, in accordance with this paragraph, exclude as between themselves

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<sup>7</sup> See Report of the Study Group of the International Law Commission, finalized by M. Koskeniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, doc. A/CN.4/L.682, at 17 – 18, paras 21 – 22, at 129 ff, para. 253 ff.

<sup>8</sup> A similar type of disconnection clause in Convention ETS 176 (2000) on European landscape set out in Article 12 provides that the Convention ‘shall not prejudice stricter provisions concerning landscape protection, management and planning contained in other existing or future binding national or international instruments.’

<sup>9</sup> This type of disconnection clause is also contained in Article 27 of Convention ETS 127 (1998) on mutual administrative assistance in tax matters and in Article 30 (3) of Convention ETS 156 (1995) on Illicit Traffic by Sea implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

the application of this Convention shall notify the Secretary General of the Council of Europe accordingly.’<sup>10</sup>

Within this framework, disconnection clauses can also be described as ‘complete’, ‘partial’ or ‘optional’. Typically, disconnection clauses are ‘complete’, such as in article 27 (1) of the European Convention on Transfrontier Television, Strasbourg, 1989, which reads:

‘In their mutual relations, parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except insofar as there is no Community rule governing the particular subject concerned.’

A ‘partial’ disconnection clause is set out in Article 20 (2) of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 2003, which reads:

‘In their mutual relations, parties which are members of the European Community shall apply the relevant Community rules instead of Articles 15 and 18.’

An example of an ‘optional’ disconnection clause can be seen in Article 13 (3) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995, which reads:

‘In their relations with each other, Contracting States which are Members of organizations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.’

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<sup>10</sup> Similar provisions can also be found in Article 37 of Convention ETS No. 51 (1964) on the Supervision of Conditionally Sentenced or Conditionally Released Offenders; in Article 64 of Convention ETS No. 70 (1970) on the International Validity of Criminal Judgments; in Article 43 of Convention ETS No. 73 (1972) on the transfer of proceedings in criminal matters.

## The Evolution of the Disconnection Clause

The original model of the EC disconnection clause was drafted in the 1980s by the Council of Europe Secretariat and reads:

‘In their mutual relations, parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.’<sup>11</sup>

This model was generally employed by the EC until 2005 when the Russian Federation challenged the proposed disconnection clause during the negotiations for three conventions on terrorism and human trafficking.<sup>12</sup> This resulted in a rewording of the clause to include an explicit reference to both the necessary overlap between the subject of the provisions of the convention and Community Law, as well the object and purpose of the convention as factors constraining the extent of lawful ‘disconnection’ from any of a convention’s provisions:

‘[P]arties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other parties.’

The European Community and its Member States made a declaration at the time of the adoption of these conventions defending the inclusion of the disconnection clauses on the basis of the institutional structure of the EU and the need to preserve the legitimate transfer of sovereign powers from the Member States to the Community. The most relevant parts of the declaration state:

‘... The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union).... [and] will guarantee the full respect of the Convention’s provisions vis-à-vis non-European Union parties.’

However, in October 2005 when the UNESCO member states were drafting the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Diversity Convention), the European institutions again attempted to insert a disconnection which was worded as follows:

‘Notwithstanding the rules of the present Convention, those Parties which are members of a regional economic integration organization constituted by sovereign States to which their member States have transferred competence over matters

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<sup>11</sup> Convention<sup>s</sup> ETS No. 130/133 (1989) on insider trading; ETS No. 132 (1989) on transfrontier television; ETS No. 136 (1990) on certain aspects of bankruptcy; ETS No. 150 (1993) on civil liability for damage resulting from activities dangerous to the environment; ETS No. 153 (1994) on copyrights in the framework of transfrontier broadcasting by satellite, ETS No. 175 (2000) on the promotion of a transnational long-term voluntary service for young people; ETS No. 178 (2001) on the legal protection of services based on, or consisting of conditional access; ETS No. 183 on the Protection of Audiovisual Heritage and Convention No. 192 (2003) on the contact concerning children.

<sup>12</sup> The conventions under negotiation were ETS No. 196 on the Prevention of Terrorism, ETS No. 197 against Trafficking in Human Beings and ETS No. 198 on financing of terrorism.

governed by this Convention, shall apply in their mutual relations the common rules in force in that regional economic integration organization.’<sup>13</sup>

This draft provision was vetoed by the negotiating parties. In response, the Legal Service of the Council of the EU delivered an opinion defending the appropriateness of the disconnection clause due to both the external and internal requirements of the EU legal system. The increasing complexity of the EU’s external competency makes it commensurately challenging for its Member States to survey the consistency of their bilateral international agreements with EU law.

Seen in this light, disconnection clauses are simply a new tool to facilitate internal legally compatibility because it prevents third party states demanding that EU Member states apply the international agreement where necessary. And taken at face value, such logic seems both rational and pragmatic. Nevertheless, the proposed disconnection clause was not accepted into the final draft and controversy continues to surround them.

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<sup>13</sup> The provision was entitled ‘Regional economic integration organizations’: archived document of the EU Council, 22 April 2005, 7962/05, JUR 156 CULT 21.

## Controversies Surrounding the Disconnection Clause

The Russian Federation's concerns over the disconnection clause during the negotiations for three conventions on terrorism and human trafficking led to the framing of the disconnection clauses to explicitly conform to the requirements of international law as codified in Article 41(b) of the VCLT. This provision requires that *inter se* agreements, which cover disconnection clauses, should not frustrate the object and purpose of the original treaty. If, for example, the relevant Community Law fell below the standards set out in the Convention, this could be interpreted as contrary to the object and purpose of the convention. This would be particularly apparent if, for instance, the object of the convention were to establish the same level of legal protection – for example human rights - to all parties.

Some of the concerns about the impact of the disconnection clause could therefore be either avoided or regulated by setting out the key provisions and substantive rights and obligations of the parties with adequate precision and transparency to prevent compromise during its application. And this was how the EC responded to the concerns of the Russian Federation in 2005. Indeed, it is surely incumbent upon the party invoking the disconnection clause to prove that the *inter se* agreement is in line with the convention standards or higher. If the invoking party can demonstrate during the negotiations to the conventions that the application of its law would not jeopardize the integrity of the convention, this should alleviate any concern that the disconnection clause amounted to an illegal reservation. For once the treaty has been concluded and the clause has been agreed to by all the parties, no question of its validity can arise without difficulty.

Nevertheless, apprehension remains among the legal profession and governments that the full implications or 'real import' of a disconnection clause will not be known or is even 'knowable' despite full disclosure and transparency during framing of the convention. The *inter se* rules may at some future time be modified or subject to new interpretation from the ECJ, for example. As noted above, the customary international law on rule modification is codified in Article 41 VCLT. But if the new interpretation or modification was very different, the provisions may be seen to resemble a new, successive treaty, which would then be covered by Article 30 VCLT.<sup>14</sup> This brings a different complexity because Article 30:2 states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. An earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. However, in Article 30:4(b) it states that when the parties to the later treaty do not include all the parties to the earlier one, the treaty to which both States are parties governs their mutual rights and obligations.

Clearly, while legal tools are available to resolve such situations if they come to the attention of the parties most would be keen to avoid such a future scenario. Hence the concern and resistance to the disconnection clause, per se. There may also be political resistance from inside the regional body invoking the disconnection clause. The Member States of the EC for example, would be unlikely to accept the inclusion of a disconnection clause if they felt that it signaled the exclusive competence for the Community which may not have been explicitly agreed to by the Member States. As highlighted in the quotes above, the EC has always defended its use of the disconnection clause as a measure to avoid conflict between systems and ensure that the joint participation of the Community and its Member States will not alter the scope of Community law in relations between the Member States themselves, thus ensuring the primacy of Community law. Nevertheless, the recent ECJ ruling in Opinion 1/03,<sup>15</sup> signaled caution when it warned that disconnection clauses, such as the one included in Article 54B of the Lugano Convention, not only do not guarantee that Community rules are not affected but 'on the contrary may provide an indication that those rules are affected.'

The disconnection clause in the Lugano Convention has been described as the 'distributive application' of a regulation rather than being a non-application clause regarding the Convention typically employed in public international law.<sup>16</sup> The development of a 'distributive' disconnection

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<sup>14</sup> VCLT Article 30

<sup>15</sup> ECJ Opinion 1/03. Lugano Convention. 7 February 2006. *Paras.* 129–130.

<sup>16</sup> N. Lavranos. Opinion 1/03, *Lugano Convention*. *Common Market Law Review* 43: 1087–1100, 2006.



clause adds further opacity to the application and impact of these clauses, which is also likely to meet resistance at an operational level. This was the case with the advice the United Kingdom Health Protection Agency put forward to the UK government to broadly support the proposed 2005 International Health Regulations (IHR) but to lobby against EC proposal for a disconnection clause. This case was made on the grounds that there was not a good enough fit between current European legislation and the IHR and therefore it would be confusing to have two sets of regulation in a single EU country. The HPA also argued the international regulations were developed by those in the WHO with much greater technical expertise and experience in these issues than the EC bodies possessed at present.<sup>17</sup> Thus what may seem to be an exercise in legal transparency and coherence may in practice become a spaghetti bowl of legislation from different sources and of different standards.

Despite this theoretical and operational resistance to disconnection clauses, it is clear that they do serve a purpose. The classical legal tools of treaty interpretation have been criticized as inadequate to settle the conflicts of conventions and to apprehend the specificity of the construction of the European Community. It has been argued that the legal shortcomings of the VCLT, in particular Article 30 VCLT on the application of successive treaties relating to the same subject-matter, actually caused the use of the disconnection clause in the Hague convention:

‘The VCLT provisions are too strict or inappropriate conditions to the current situations to prevent the conflicts between the universal convention of The Hague and the instruments of the European Union or even vis a vis bilateral or regional level agreements... [T]he introduction of disconnexion clauses in the multilateral conventions to which European member States are to become a party, constitutes a surer means to guarantee the interests of the Community (and of the parties to special instruments) than resorting to the Article 30 of the Convention of Vienna.’<sup>18</sup>

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<sup>17</sup> The UK Health Protection Agency 2005 statement at: [www.hpa.org.uk/hpa/international/IHR\\_statement.htm](http://www.hpa.org.uk/hpa/international/IHR_statement.htm)

<sup>18</sup> O. Tell. *Op cit.* pp 4-7.

## Conclusion:

Despite the available legal tools and techniques for assessing the conformity of the disconnection clause with the rules of international law, they continue to be viewed either with suspicion or interest. They have been criticized as an undesirable symptom of the fragmentation of international law, a political tool for blurring the limits of EC competence, as well as a symptom of the inadequacy of current legal techniques for interpreting overlapping and successive treaties. Indeed some may be astounded that 'disconnection clauses have acquired the status of positive law because other signatories have acquiesced in them.'<sup>19</sup>

So even when the legitimacy of a particular disconnection clause is based on the consent of the contracting parties to each convention, they are still problematic. Most superficially, there is often a lack of transparency and information about the legal provisions that are replacing those of the convention. But this can be addressed through ensuring full disclosure and discussion during negotiations. A more profound issue is the natural evolution of regimes and legal interpretation which can take place independently and possibly without the knowledge of the other parties. For alongside the a tendency to harmonise the obligations of both treaties in a 'maximal' manner, this open-endedness can allow for the provisions covered by the disconnection clause to be altered beyond the boundaries set down by the customary rules of international law and as codified in the VCLT. If the EC practice of disconnection is followed by other states or regional blocks, it frustrates efforts to find difficult multilateral compromises because of the suspicion that they will subsequently fragment into the 'spaghetti bowl' of regional legal obligations.

Nevertheless, the reality is that regionalism is currently moving faster than universalism or multilateralism. A community of interests tends to be stronger at a regional level and there is less resistance to deeper integration, interdependence and harmonization than at the multilateral level. The adoption of stricter rules and stronger solutions at a regional level should not be discouraged. Not only would this be politically unacceptable, but the stronger rules are primarily intended to achieve greater results for the citizens of those communities. It would be erroneous to prohibit this. As with the WTO Article XXIV on Regional Trading Arrangements, it is better to develop tools to incorporate and regulate regionalism under the umbrella of multilateralism, than to risk a perceived irrelevance of the multilateral umbrella.

Rather than reject the fragmentation, conflict and overlap of international law, some have argued that the proliferation and diversity of international courts and tribunals is actually a symptom of the maturity of the international legal system and reflection of the growing unity and integrity of international law.<sup>20</sup> One analysis of international courts and tribunals and the potential of conflicting rulings concluded that the judges and arbitrators in the various international courts and tribunals more or less apply the same methodology, and thus come to more or less the same application of international law.<sup>21</sup> Other studies emphasise the evidence pointing towards a common law of international adjudication, or convergence between international courts and tribunals regarding the way they handle similar or comparable procedural issues.<sup>22</sup> Consequently, these studies argue, there is little danger of international law fragmenting.

This paper therefore concludes that the disconnection clause is and is likely to remain a symptom of regionalism. Any concerns can be addressed by requiring new criteria concerning the conformity of

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<sup>19</sup> Magdalena Ličková. The European Exceptionalism in International Law. *European Journal of International Law* Vol. 19 no. 3 2008.

<sup>20</sup> J. Charney, Is International Law threatened by multiple International Tribunals?, *Recueil des Cours* (1998), Tome 271, pp. 105-382.

<sup>21</sup> J. Charney, The 'horizontal' growth of International Courts and Tribunals: Challenges or Opportunities? *American Society of International Law Proceedings* 2002, p. 369.

<sup>22</sup> Ch. Brown, *A Common Law of International Adjudication*, (OUP 2007).

the provisions covered by a disconnection clause. This will help to avoid any erosion of legal rules that are integral to a treaty and ensure the coherence and uniform application of the law. The disconnection clause is a response primarily to an EU domestic legal system which tends to provide laws and regulations that are stronger than multilateral ones. This means that at present they typically strengthen rather than undermine the object and purpose of the international treaty. If the disconnection clause becomes more widely used in other regional arrangements each clause must be assessed on a case by case basis. For although the VCLT provides some guidance on the modification and interpretation of overlapping public international laws, disconnection clauses are evolving and need to continue to mature to reflect the concerns of the other parties to the convention, as well as developments in deep integration unforeseen by the framers of the VCLT.

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